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IN THE

Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

HAYWOOD EUDON HALL a/k/a DON HALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization, and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL's objectives include furthering the proper administration of justice and ensuring that criminal statutes are properly construed and applied in accordance with the United States Constitution. One of the NACDL's particular concerns is to ensure that the criminally accused and suspected are not subjected to the kind of prosecutorial overreaching to which the Eleventh Circuit's interpretation of the statute in this case lends itself.

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1. Each party's blanket consent to *amicus* submissions has been filed with the Clerk of the Court. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than the NYCDL or its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amicus adopts the statement of the case reflected in petitioners' brief.

SUMMARY OF ARGUMENT

If the commission of an overt act is not an element of 18 U.S.C. §1956(h), which punishes conspiracies to violate both 18 U.S.C. §1956 and 18 U.S.C. §1957, two or more persons who contemplate committing specified unlawful activity generating proceeds, would *ipso facto* be guilty of conspiracy to engage in monetary transactions, a broadly defined term, involving criminally derived property, in violation of §§1956(h) and 1957, because virtually any monetary transaction involving such proceeds will violate §1957. Without an overt act requirement, there would be no limiting principle that would distinguish the commission of the specified unlawful activity from the commission of conspiracy to violate §1957.

Moreover, imposing an overt act requirement in conspiracy prosecutions under §1956(h) would not burden the government. Instead, it would merely harmonize §1956(h) and 18 U.S.C. §371, under which money laundering conspiracies traditionally were prosecuted, while providing some indication that the conspiracy is still at work and the prosecution timely, the traditional and important purposes of the overt act requirement in conspiracy law. Indeed, without an overt act requirement,

conspiracy to commit money laundering would give federal prosecutors unbridled discretion to bring such prosecutions whenever and wherever they choose, implicating constitutional due process principles and concerns.

Conspiracies to commit violations of §1956 or §1957 are extremely serious offenses. Before a defendant can be convicted and punished for such a conspiracy, the Court should determine that Congress plainly and unequivocally intended to relieve the government of the obligation to plead and prove an overt act. Far from demonstrating that intention with the requisite clarity, Congress has in fact demonstrated an intent to impose an overt act requirement in the context of conspiracy to commit money laundering or money spending offenses.

ARGUMENT

By its terms, 18 U.S.C. §1956(h) punishes both conspiracies to violate the federal money laundering statute, 18 U.S.C. §1956, and the statute prohibiting engaging in monetary transactions in criminally derived property. 18 U.S.C. §1957.[2] The "only *mens rea* requirement [for a §1957 offense] is 'knowledge' of the prior criminal conduct that tainted the property involved in the proscribed activity." *United States v. Gabriele*, 63 F.3d 61, 65 (1st Cir. 1995). By contrast, §1956 contains the additional *mens rea* element of an intent to conceal or promote the specified unlawful activity from which the proceeds derive. As a result, §1957 has been termed a "money spending" statute, and not a money laundering statute. *United States v. Cefaratti,* 221 F.3d 502, 513 n.7 (3d Cir. 2000) ("unlike §1956, §1957 is indeed a money spending statute"); *United States v. Omoruyi*, 260 F.3d 291, 300 n.13 (3d Cir. 2001) ("unlike section 1956(a)(1), section 1957(a) contains neither a promote nor a conceal element"). As one federal court has explained:

> Section 1957 differs from section 1956 in two critical respects: It requires that the property have a value greater than $10,000, but it does not require that the defendant know of a design to conceal aspects of the transaction or that anyone have such a design. Due to the omission of a "design to conceal" element, section 1957 prohibits a wider range of activity than money "laundering," as traditionally understood. The description of [a section 1957 violation] does not speak to the attempt to cleanse dirty money by putting it in a clean form and so disguising it. This statute applies to the most open, above-board transaction. The intent to commit a crime or the design of concealing criminal fruits is eliminated.

United States v. Allen, 129 F.3d 1159, 1165 (10th Cir. 1997) (citations omitted).

Thus, a violation of §1957 is almost necessarily a concomitant of the commission of any specified unlawful activity that generates illicit funds, particularly in view of the broad definition of §1957's element of a "monetary transaction."[3] *See, e.g., United States v. Pretty,* 98 F.3d

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2. §1956(h) provides in relevant part that any person who conspires to commit "any offense defined in this section or section 1957" is subject to the penalties for the underlying substantive offense created by and defined in each section.

3. *See* 18 U.S.C. §1957(f)(1) (monetary transaction "means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in [§1956(c)(5)]) by, through, or to a financial institution (as defined in [§1956]), including any transaction that would be a

(continued...)

1213 (10th Cir. 1996) (use of proceeds of specified unlawful activity to purchase car, apartment complex and house violated §1957); *United States v. Marshall,* 248 F.3d 525, 535 (6th Cir. 2001) (use of proceeds to open brokerage account makes out §1957 offense).

The already disturbing breadth of §1957 is exponentially expanded, however, if no overt act is required to commit a conspiracy to violate §1957, in violation of 18 U.S.C. §1956(h). Without an overt act requirement, two or more defendants who plan to commit specified unlawful activity generating proceeds almost by definition will also be conspiring to commit a §1957 offense, unless of course they plan to commit a crime just for the fun of it and to hide the proceeds under the mattress for all eternity.

In other words, omitting an overt act requirement from §1956(h) would impermissibly blur the distinction between the specified unlawful activity and the money spending conduct punished by §1957, which is intended to deprive the wrongdoer of the financial benefit of his crime by punishing the spending or knowing receipt of the proceeds. *See* H.R. Rep. No. 855, 99th Cong., 2d Sess. 13-14 (1986). Indeed, the Court has recognized that both §1956 and §1957 are "after-the-fact" offenses committed with the proceeds generated by consummated specified unlawful activity. *United States v. Cabrales,* 524 U.S. 1, 7

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3. (...continued)
financial transaction under [§1956(c)(4)(B)]").

(1998). *See also United States v. Lee,* 232 F.3d 556, 559 (7th Cir. 2000) ("For a section 1957(a) conviction to be proper, 'criminally derived property' must first have existed, and then at a later time, the charged party must have attempted to bring about or have actually brought about a transaction with it"); *United States v. Piervinanzi,* 23 F.3d 670 (2d Cir. 1994) (reversing §1957 conviction because defendants had not taken possession of the fraudulently obtained proceeds until after the charged §1957 transaction).

Interpreting the statute to require not simply the conspiratorial agreement to spend the proceeds of criminal activity, but the pleading and proof of an overt act in furtherance of that agreement, would solve this serious problem that Congress never contemplated or intended. An overt act requirement would help to identify the offense (i.e., specified unlawful activity versus money spending) furthered by the conduct, and sharpen the lines between the specified unlawful activity and the after-the-fact money laundering or money spending conduct, thereby furthering Congressional intent.

The position of the NACDL is not affected or altered by *United States v. Shabani,* 513 U.S. 10 (1994). The opposite is true. Both before and after *Shabani,* Congress reflected its intent to impose an overt act requirement for conspiracy to commit money laundering

and money spending offenses.[4] In view of this legislative history, reflecting a clear and consistent Congressional intent to require pleading and proof of an overt act in prosecutions for conspiracy to commit money laundering and money spending offenses, it is not surprising that the overwhelming majority of the lower federal courts which have addressed the issue after *Shabani* have concluded

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4. Prior to the 1992 amendment adding the present §1956(h), the government easily prosecuted money laundering and money spending conspiracies under the general federal conspiracy statute, 18 U.S.C. §371, which contains an overt act requirement, and the legislative history to §1956(h) reflects a Congressional purpose merely to increase the penalties for conspiracy to commit money laundering and money spending, not to eliminate the overt act requirement. *See, e.g.*, Conference Report, 138 Cong. Rec. S17,904 (daily ed. Oct. 8, 1992). After *Shabani*, Congress enacted the USA PATRIOT Act to, *inter alia,* identify the circumstances under which venue to prosecute money laundering substantive and conspiracy offenses would lie in the district where the specified unlawful activity was committed. In so doing, however, Congress clarified that venue would also lie where an overt act ("an act in furtherance of the attempt or conspiracy") was committed. Pub. L. 107-56, §1004, 115 Stat. 308, 392-93 (Oct. 26, 2001), codified at 18 U.S.C. §1956(I)(2).

that the conspiracy offense codified in §1956(h) requires pleading and proof of an overt act.[5]

Overt acts play a critically important role in conspiracy prosecutions since they are the only external manifestation of a crime "predominantly mental in composition." *Krulewitch v. United States*, 336 U.S. 440, 447-48 (1949) (Jackson, J., concurring). Overt acts demonstrate that "the conspiracy is at work, and is neither a project still resting solely in the minds of the conspirators, nor a fully completed operation no longer in

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5. *See, e.g., United States v. Evans,* 272 F.3d 1069, 1082 (8th Cir. 2001); *United States v. Wilson*, 249 F.3d 366, 379 (5th Cir. 2001); *United States v. Ross,* 190 F.3d 446, 450 (6th Cir. 1999); *United States v. Hildebrand,* 152 F.3d 756, 762 (8th Cir. 1998); *United States v. Navarro,* 145 F.3d 580, 593 (3d Cir. 1998); *United States v. Emerson,* 128 F.3d 557, 561 (7th Cir. 1997); *United States v. Olson,* 76 F.3d 393, 1995 WL 743845, at *2 (10th Cir. Dec. 15, 1995); *see also United States v. Cline,* 2002 WL 1162424 (D. Kan. 2002) (dismissing money laundering conspiracy on Rule 29 motion for failure to plead overt act); *but see United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001). The Second Circuit has twice explicitly left this question open and undecided. *United States v. Henry*, 325 F.3d 93, 103 n.6 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 173 n.2 (2d Cir. 2002). Apparently the Fourth Circuit has as well. *United States v. Goodwin,* 272 F.3d 659, 669 n.9 (4th Cir. 2001).

existence." *Yates v. United States,* 354 U.S. 298, 334 (1957) (citations omitted). In view of the importance of overt acts in conspiracy prosecutions, this Court should require Congress to manifest its intent to relieve the government of an overt act requirement in the clearest possible terms. Here, far from demonstrating a clear intent to relieve the government of an overt act requirement, Congress has in fact manifested an intent to impose an overt act requirement in prosecutions under §1956(h).

Finally, without an overt act requirement, conspiracy to commit a money spending offense would give federal prosecutors unbridled discretion to bring such prosecutions virtually whenever and wherever they choose. The breadth and dangers of the law of conspiracy have been long noted (*Krulewitch,* 336 U.S. at 445), and §1957 has been described as "draconian" because of its "elimination of criminal intent." *Allen,* 129 F.3d at 1159 (quoting *United States v. Rutgard,* 116 F.3d 1270, 1291 (9th Cir. 1997)). Coupling conspiracy law with the money spending statute is therefore already fraught with the potential for prosecutorial abuse. Relieving the government of the single most important limiting principle in conspiracy law — the pleading and proof of a valid overt act — creates a witches brew of unfettered prosecutorial discretion and inevitable abuse. *See Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972) (vague laws "impermissibly delegates basic policy matters" to law enforcement on an *ad hoc* basis).

CONCLUSION

For the reasons set forth above, and for those set forth in petitioners' brief, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

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